No. 80-1313

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JULIA McCAIN LAMPKIN-ASAM,
PH.D., Appellant,

v.

FTP-NEA (FLORIDA TEACHERS
PROFESSION-NATIONAL EDUCATION
ASSOCIATION), Appellee.

ON APPEAL FROM THE SUPREME
COURT OF FLORIDA

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

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INTEREST OF AMICUS CURIAE

The Attorney General of the State of Florida, pursuant to Rule 36.4, Rules of the Supreme Court of the United States respectfully submits this brief on behalf

of the State of Florida as amicus curiae urging that this appeal be dismissed on the grounds that it fails to present a substantial federal question. Alternatively, the State of Florida submits that the judgment of the First District Court of Appeal of Florida should be summarily affirmed.

The Appellant seeks review in this Court of the Supreme Court of Florida's Order dismissing her Petition for Review of her state court action. Additionally, Appellant seeks to have this Court declare invalid Article V, Section 3(b)(3) of the Florida Constitution, pursuant to which the Supreme Court of Florida declined to review the Final Judgment of the First District Court of Appeal of Florida. Because the State, or any other

person interested in defending the referenced rule, was not named as a party below, the State has a vital interest in appearing as amicus curiae in support of its constitutional provision.

STATEMENT OF THE CASE

As demonstrated throughout Appellant's jurisdictional statement, her appeal to this Court stems from a State civil action wherein Appellant was Plaintiff, and the Florida Teaching Profession -National Education Association was the Defendant. While the State of Florida, as amicus curiae has not had the benefit of examining the record in said action, it appears that Appellant sued Appellee in that action for failure to provide legal assistance to Appellant, allegedly pursuant to a contract between the par-

ties. As demonstrated by Exhibit "D" to Appellant's jurisdictional statement, Final S ımmary Judgment was rendered by a State circuit court, in favor of Appellee, which included the finding that there was no genuine issue of material fact. Appellant filed her appeal from that judgment, and the judgment was affirmed, per curiam, by the First District Court of Appeal of Florida, and thereupon her Petition for Rehearing was denied. As demonstrated by Exhibit "A" to Appellant's jurisdictional statement, the Supreme Court of Florida dismissed her Petition for Review filed in that Court, citing its decision in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), which construed Article V, Section 3(b)(3) of the Florida Constitution, as amended, to pro-

hibit jurisdiction by the Florida Supreme Court to review a District Court of Appeals' decision, where the decision read in its entirity "per curiam affirmed". Thus it further appears that the final judgment which Appellant seeks to have reviewed, by appeal, in this Court, is not the judgment of the Supreme Court of Florida, but is actually that judgment rendered by the First District Court of Appeal, and which affirmed the trial court's granting of summary judgment in favor of Appellee.

While the amicus curiae has not had the benefit of examining the record on appeal, it appears that the question of the United States constitutionality of the referenced Florida Constitutional provision was not raised in the state

courts below, but is being presented for the first time in this appeal.

SUMMARY OF ARGUMENT

The appeal should be dismissed for want of a substantial federal question. It appears that there has been no decision by any state court construing the validity of Article V, Section 3(b)(3) of the Florida Constitution, under the Constitution, treaties, or laws of the United States. Rather, it appears that the Supreme Court of Florida merely refused jurisdiction of Appellant's appeal from the final judgment of the First District Court of Appeal of Florida, which affirmed the trial court's granting of summary judgment to Appellee. The final summary judgment entered by the

state trial court contains no reference to any federal claim raised by Appellant, but rather appears to address the merits of Appellant's civil suit on adequate and independent state grounds. Accordingly, Appellant mistakenly invokes the appellate jurisdiction of this Court, by relying on a Florida Constitutional provision which apparently was not presented to the state courts for review, on federal constitutional or statutory grounds, and which was apparently only utilized by the Supreme Court of Florida in declining to exercise its appellate jurisdiction over Appellant's state court claim. Accordingly, Appellant's alleged claim for denial of her right to due process and equal protection of the laws under the Fifth and Fourteenth Amendments to

the United States Constitution, were not raised below, and thus may not be raised for the first time in this appeal.

ARGUMENT

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellant has mistakenly invoked the appellate jurisdiction of this Court. The only United States statutory provision cited by the Appellant in her jurisdictional statement which could arguably confer jurisdiction on this Court is 28 U.S.C. §1257 (2), which confers appellate jurisdiction on this Court from final judgments rendered by the highest state court which could have reviewed the matter,

> . . . where is drawn in question the validity of a statute of any state on the ground of its being

> repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

First, Appellant incorrectly identifies this appeal as lying from the Supreme Court of Florida. The appeal, if otherwise proper, would lie only from the final order entered by the First District Court of Appeal of Florida, denying her petition for rehearing, and which in effect affirmed the trial court's granting of summary judgment to Appellee. The Supreme Court of Florida, as evidenced by Exhibit A to Appellant's jurisdictional statement, did not review the judgment of the First District Court of Appeal on its merits, but rather dismissed Appellant's state petition for review, noting that it was without jurisdiction and citing

Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The Jenkins decision construed Article V, Section 3(b)(3), of the Florida Constitution, as it became effective on April 1, 1980, and which provision conferred jurisdiction on the Florida Supreme Court to review:

> Any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

Thus, in Jenkins the Supreme Court of Florida concluded that it lacks jurisdiction to review per curiam decisions of the Florida District Courts of Appeal which are rendered without an opinion. As evidenced by Exhibit C to Appellant's jurisdictional statement, such was the nature of the decision of the First

District Court of Appeal of Florida in Appellant's state court action.

Accordingly, it is obvious that the Supreme Court of Florida had no occasion to address any federal question which is now raised by Appellant for the first time, and that pursuant to 28 U.S.C. §1257 (2), the "highest court of a State in which a decision could be had", as pertains to this action, relates to the decision of the First District Court of Appeal of Florida affirming the final summary judgment entered by the trial court. See Sullivan v. State of Texas, 207 U.S. 416 (1908); Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968).

Inasmuch as Appellant's constitutional claim, that the referenced Florida Constitutional provision deprives her of federal constitutional rights, was apparently not raised or decided by the state courts below, her appeal should be dismissed for lack of a substantial federal question. This Court has repeatedly held that it will not consider a question not raised below. See e.g. Michel v. Louisiana, 350 U.S. 91 (1956); F. G. Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897):

> The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare, "specially," that is, unmistakenably,

> this court is without authority to re-examine the final judgment of the state court.

Here it appears that final summary judgment was entered by the Florida trial court, in favor of Appellee, and that Appellant's now alleged federal constitutional claim was not raised before that court, and hence was not an issue on appeal before the First District Court of Appeal of Florida. Indeed, as a practical matter, it seems that the federal question raised in Appellant's jurisdictional statement arose only after the Supreme Court of Florida denied her petition for state review. As held by this court in Whitney v. California, 274 U.S. 357, 360 (1927):

> It has long been settled that this court acquires no jurisdiction to review

> the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. . .

Inasmuch as from the Exhibits appended to Appellant's jurisdictional statement, it appears that her federal constitutional claim was not part of the record below, this Court should follow its long rooted precedent, and dismiss her appeal. See e.g. Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934).

The lack of appellate jurisdiction in this court is perhaps most aptly demonstrated by the Court's decision in John v. Paullin, 231 U.S. 583, 5-7 (1913), where the Court held in part as follows:

As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. . . . Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

* * *

Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction

> and the rules of practice to be applied in its exercise; and the state laws and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.
>
> * * *
>
> Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the Constitution and laws of the state. In short, the judgment of dismissal turned entirely upon a question of local law.

Accordingly, since the opinion of the Supreme Court of Florida, in Appellant's state court action (Exhibit A of her jurisdictional statement) clearly states

that said Court lacked jurisdiction, and thus her petition for review was dismissed, and cited in support thereof a prior decision by that Court construing the amended Florida constitutional provision which Appellant attacks herein, it is obvious that there was no decision on the merits of Appellant's federal constitutional claim, which is apparently raised for the first time in this appeal. Thus this Court should follow its decision in John v. Paullin, supra, and dismiss Appellant's appeal, for want of a substantial federal question.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed, or the judgment of the Surpeme Court of Florida should be affirmed.

Respectfully submitted,

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